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ABSTRACT

This paper is part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002. It addresses the Individuals with Disabilities Education Act (IDEA). Specifically, the paper examines unilateral placements for drug-abusing and uelinquent students. Following the introduction, the next section of the paper presents background information, along with predictions, on private placements for students engaged in drug abuse or serious delinquency. The next section reviews relevant statutes and case law on the major issues connected with such placements, including child find, definitions of disability, appropriateness of private placement, notice requirements, and equitable considerations. The final section offers the following recommendations to school officials to reduce the potential exposure for tuition reimbursements claims: (1) Ensure that all parents and staff are aware of the 10-day prior-notice requirement; (2) insist on full disclosure of all information when parents withdraw a child and pursue a private residential program; (3) demonstrate good faith and a willingness to work with parents toward a return of the student to the public school; and (4) examine carefully the programs and services delivered to the child in the private placement. (Contains 27 footnotes, some of which include references.) (WFA)

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Pot Addiction and Parental Friction: Emotional Disturbance, Conduct Disorders and Unilateral Placements for Drug-Abusing Students Under the IDEA.

David S. Doty

November 2002

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Pot Addiction and Parental Friction: Emotional Disturbances, Conduct Disorders, and Unilateral Placements for Drug-Abusing Students Under the IDEA

48th Annual Conference of the Education Law Association
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New Orleans, LA

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"This is your brain (show egg). This is your brain on drugs (show egg frying in pan)."

--Public service television advertisement by the Partnership for a Drug-Free America.

"The term 'child with a disability' means a child—(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs specia' education and related services."

--Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401(3).

I. Introduction

Among educators and attorneys, it is well known that litigation under the Individuals with Disabilities Education Act (IDEA) has been, and continues to be, one of the most active areas of legal conflict in American public schools.[1] In fact, certain subsets of IDEA litigation have, in recent years, experienced what might be called explosive growth. One of these subsets involves parental demands for tuition reimbursement for private school placements; the number of published administrative and judicial tuition reimbursement decisions "has increased relatively steadily and steeply [from] . . . 1978 to 2000."[2]

Yet while several scholars have examined the volume, and outcome, of tuition reimbursement cases, there has been little written about the "nuts and bolts" of unilateral placement disputes. This paper attempts to partially fill that gap, and add to the existing literature,[3] by examining unilateral placements for drug-abusing and delinquent students, placements which have the potential to be the source of great consternation for school districts if aggressive steps are not taken to prevent, and establish proper defenses against, them.

Part II of the paper will provide some background, and predictions, regarding private placements for students engaged in drug abuse or serious delinquency. Part III will review relevant statutes and case law on the major legal issues connected with such placements, including child find, definition of disability, FAPE, appropriateness of private placement, notice

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[1] See, e.g., Perry A. Zirkel, The "Explosion in Education Litigation: An Update, 114 **Educ. L. Rep.** 341 (1998); Perry A. Zirkel, Tipping the Scales, **American Sch. Bd. J.**, Oct. 1997, at 36, 37; What the Numbers Say About Special Education Litigation, **The Special Educator**, May 27,1995, at 325, 334-335.

[2] Thomas A. Mayes & Perry A. Zirkel, Special Education Tuition Reimbursement Claims: An Empirical Analysis, 22 **Remedial & Special Educ.** 350, 355 (November/December 2001).

[3] See, e.g.,Cindy L. Skaruppa, Ann Boyer, & Oliver Edwards, Tuition Reimbursement for Parent's Unilateral Placement of Students in Private Institutions: Justified or Not?, 114 **Educ. L. Rep.** 353 (1997); Allan G. Osborne, Reimbursement for Unilateral Parental Placements in Unapproved Private Schools Under IDEA, 90 **Educ. L. Rep.** 1 (1994); Dixie Snow Huefner, Special Education Residential Placements with Severe Emotional Disturbances: The Implications of Recent Ninth Circuit Cases, 67 **Educ. L. Rep.** 397 (1991).

requirements, and equitable considerations. Finally, Part IV of the paper will conclude with some recommendations as to how the IDEA should be rewritten by Congress, and some practical suggestions for school officials responsible for the delivery of special education.

II. Background

One of the hottest areas in special education involves parental demands for payment of tuition costs associated with residential treatment programs for students with serious emotional or behavioral problems. Over the past few years, school districts across the country have faced these demands, which are disastrous regardless of the outcome given the time, money, and human capital districts must spend to defend high-dollar claims for private residential care.

What is most troubling is that tuition reimbursement demands of this type may only become more common, for several reasons. First, although some progress has been made,[4] drug use among American teenagers remains at unacceptably high levels. According to the World Health Organization, 41% of 10th graders in the United States have tried marijuana, compared with just 17% of 10th graders in Europe, and 23% of American 10th graders have used other illicit drugs, compared with just 6% of Europeans.[5] Other recent studies, conducted by the U.S. Department of Health and Human Services, report that more and more students are using steroids, Ecstasy, and heroin.[6]

Second, it is well documented by medical professionals that adolescents who abuse illicit drugs demonstrate impaired functioning in school and other settings. In one published study, two scientists concluded:

> Students who use illicit drugs show deficits in school performance, quality of family relationships, and health and increased psychological symptoms. Compared with nonusers, they are more delinquent and more actively involved with their peers and live in social environments in which the perceived use of drugs by other adolescents and parents is more extensive. Delinquency and extent of perceived drug use consistently increase with each higher stage of use.[7]

Third, an increasing number of teenagers who use drugs are developing serious addictions, but few who need treatment actually receive it. According to recent data, approximately 1.1 million children 12-17 years old have problems with drugs and alcohol, but only

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[4] Michael Kranish, More Students Say Schools Drug Free, **Boston Globe**, Aug. 21, 2002, at A2.

[5] U.S. Teens Use Drugs More, **Arizona Republic**, Feb. 21, 2001 http://www.arizonarepublic.com/cgi-bin/print-php3

[6] Report: Teen Drug Use Unchanged, **Washington Post**, Dec. 15, 2000, at A6.

[7] Denise B. Kandel & Mark Davies, High School Students Who Use Crack and Other Drugs, 53 **Archives General Psychiatry** 71 (January 1996).

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about 122,000 of them received treatment in 2000.[8] Because drug treatment programs are costly and scarce, often the only students to get treatment are those whose parents have the financial means to send their children away.[9]

These factors combined may very well result in more attempts by parents to use the IDEA as a vehicle to obtain funding for residential treatment programs. When called upon to weigh in on these disputes, hearing officers and courts must carefully balance the rights of students with disabilities against the rights, and obligations, of school officials to make accurate eligibility determinations and provide appropriate programs for students in the least restrictive environment.

III. High Stakes Placements: The Legal Issues Connected with Unilateral Residential Placements

Parental demands for tuition reimbursement present a complex array of issues, and the law on many of them is unsettled, because there is either a lack of court precedent or a split among the courts in the decisions that have been rendered. Nevertheless, knowledge of the law as it has evolved to date will hopefully be useful to legal counselors and school leaders desiring to minimize liability.

A. The *Burlington/Carter* Framework

The basic principles governing tuition reimbursement under the IDEA are found in two U.S. Supreme Court cases, School Committee of Town of Burlington v. Department of Educ.[10], and Florence County Sch. Dist. Four v. Carter.[11] In Burlington, the Court established a two-pronged test to be used in deciding whether parents are entitled to tuition reimbursement under the IDEA, stating: "In a case where [1] a court determines that a private placement desired by the parents was proper under the Act and [2] that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective

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[8] Donna Leinwand, Youth Need More Drug Programs, Study Shows, **USA Today**, Feb. 7, 2002 http://www.usatoday.com/news/washdc/2002/02/08/usat-treatment.htm. See also, Quynh-Giang Tran, Study Details Teens' Drug Use, **Boston Globe**, June 14, 2002, at A18 (noting that one out of every six teenagers in the Boston area abuses drugs or alcohol or is so dependent on these substances that in-patient treatment may be required).

[9] Id. See also, James Thalman, Only a Fifth of Addicts Treated, **Deseret News**, Aug. 13, 2002 http://www.deseretnews.com/dn/print/1,442,405023886,00.html (noting that only 22,000 of 80,000 drug addicts in Utah receive necessary treatment, and that many insurance plans only cover a traditional approach, involving 30 days of in-patient hospital treatment).

[10] 471 U.S. 359 (1985).

[11] 510 U.S. 7 (1993).

injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school." [12]

In Carter, the Court reiterated this test, emphasizing that parents who unilaterally change their child's placement without the consent of school officials, "'do so at their own financial risk,'" and that they are "entitled to reimbursement *only* if a federal court concludes both that the public placement violated the IDEA and that the private school placement was proper under the Act."[13] Moreover, Carter held that parents are not automatically barred from reimbursement if the private school in which they unilaterally place their child fails to meet state education standards.

B. Alleged Denial of FAPE by Failure to Comply with "Child Find"

Many of the reimbursement decisions concerning children with drug abuse or delinquency problems involve allegations that school officials failed to evaluate, or identify, in a timely manner, a student's emotional disturbance ("ED"). Specifically, districts are often charged with violating IDEA's "child find" mandate, which provides that States and school districts must ensure that:

> All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.[14]

It is not clear from this language whether a school district owes a specific "child find" duty to each eligible child with a disability, as opposed to simply a general duty to make the public and parents aware of the services available in the district. However, most hearing officers and courts have held that the "child find" duty does run to individual children, finding that "[t]he individual right to a free appropriate public education for a child who is classified for special education purposes is meaningless if the child has no comparable right to demand classification."[15]

At the same time, the "child find" duty is "in no way absolute."[16] School officials must at least have knowledge of the disability, which "may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation." [17]

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[12] Burlington, 471 U.S. at 370.

[13] Carter, 510 U.S. at 15 (quoting Burlington, 471 U.S. at 373-74).

[14] 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.125.

[15] Davis County School District, 102 LRP 4246 (SEA UT 1998) (citing Clay T. v. Walton County Sch. Dist., 25 IDELR 409 (M.D. Ga. 1997). See also Robertson County Sch. Sys. V. King, 99 F.3d 1139 (6th Cir. 1996); Round Rock Indep. Sch. Dist., 25 IDELR 336 (SEA TX 1996); Eagle Point Sch. Dist., 18 IDELR 1268 (SEA OR 1992)).

[16] Wiesenberg v. Board of Educ. of Salt Lake City Sch. Dist., 181 F.Supp.2d 1307, 1311 (D. Utah 2002).

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Unfortunately, in the absence of a specific request or referral for evaluation, it is not clear how much evidence of disability school officials must observe before the duties to evaluate, and classify, kick in. One frequently cited case in this area, Clay T. v. Walton County Sch. Dist.[18], stands for the proposition that school officials do not violate the "child find" mandate unless they overlook "clear signs" of disability and offer no rational justification for deciding not to evaluate. A somewhat different standard was recently articulated by a federal court in Hawaii, which stated that the duty "is triggered when the [school] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability."[19] Regardless of the confusion over the quantum of knowledge required, it is probably safe to say that the "child find" duty is not triggered simply by notice that a child has an impairment. School officials must be put on notice that a child has a disability, and that such disability is causing an adverse effect on the child's education.

School officials should thus be aware of this threshold issue, particularly if a unilateral placement dispute ends up in litigation. Several districts have successfully defeated reimbursement demands on grounds that school officials had no prior notice of either the student's impairment or its adverse effect on the student's school performance. See, e.g., Montgomery County Pub. Sch., 102 LRP 19074 (SEA MD 2002) (denying reimbursement because while school officials knew student had been hospitalized prior to withdrawal from district and enrollment in residential placement, they did not know the nature of the psychotic episode or have any information that the student was depressed or had ADD); Katherine S. v. Umbach, No. Civ. A. 00-T-982-E, 2002 WL 226697 (M.D. Ala. 2002) (denying reimbursement for tuition at the Elan School in Maine because school officials had no reason to suspect that student needed special education, because despite diagnoses of ODD, ADHD, asthma, depression, and conflict with parents, student was "vivacious" and academically successful); West Chester Area Sch. Dist., 32 IDELR 275 (SEA PA 2000) (school officials had no reason to suspect that student with depression and behavior problems at home was disabled simply because her grades fluctuated and declined); Hoffman v. East Troy Community Sch. Dist., 38 F.Supp.2d 750 (E.D. Wis. 1999) (teachers' observations that student fell asleep in class, had poor classroom performance, and failed one class did not give rise to suspicion that student was emotionally disturbed); Davis County Sch. Dist., 102 LRP 4246 (SEA UT 1998) (district did not have child find duty regarding a student who, despite parental conflict and drug use outside of school, appeared emotionally stable and academically successful in the classroom).

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[17] Id. (citing 20 U.S.C. § 1415(k)(8)(B)(i-iv)).

[18] 25 IDELR 409 (M.D. Ga. 1997).

[19] Department of Educ., State of Hawaii v. Cari Rae S., 158 F.Supp.2d 1190, 1194 (D. Hawaii 2001).

On the other hand, school officials who ignore evidence of disability and related poor school performance do so at their peril. See, e.g., Department of Educ., State of Hawaii v. Cari Rae S., 158 F.Supp.2d 1190 (D. Hawaii 2001) (ordering tuition reimbursement as the result of "child find" violation where school officials ignored student's dramatically declining grades and escalating disciplinary problems); Round Rock Indep. Sch. Dist., 25 IDELR 336 (SEA TX 1996) (ordering partial reimbursement on grounds that district should have evaluated student, who exhibited various behavioral problems, including defiance of parents, truancy, car theft, running away from home, and substance abuse, to determine whether student met the criteria for serious emotional disturbance in addition to being socially maladjusted); Lake Washington Sch. Dist. No. 414, 257 IDELR 611 (OCR 1985) (finding that district's blanket policy of refusing evaluations for alcohol and drug addicted students was discriminatory, because even though substance abuse does not qualify students for special education under the IDEA, such students still may have disabilities under Section 504).

C. Defending the IEP

If a student with drug abuse or delinquency problems has not been classified as a student with a disability before his parents unilaterally place him in a residential setting, virtually the only way the parents can meet the first prong of the Burlington test (showing that the district denied FAPE) is to prove a "child find" violation. However, it sometimes occurs that a student who has been previously identified with a disability is suddenly removed from the school system and placed unilaterally by his parents in a residential facility. In that case, school officials must be prepared to defend the IEP that existed at the time of the student's exit from the district.

1. Procedural Defense #1: Parental Failure to Provide 10-Day Prior Written Notice

This can be done on both procedural and substantive grounds. Procedurally, school officials can assert that reimbursement should be denied if the parents suddenly, and without prior notice, withdrew their child from the district without objecting to the IEP. The IDEA regulations explain:

> (d) Limitation on reimbursement. The cost of reimbursement [for private school placement] . . . may be reduced or denied—
> (1) If—
> (i) At the most recent IEP meeting that the parents attended prior to the removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section.[20]

[20] 34 C.F.R. § 300.403(d).

Interestingly, courts have held that this provision applies only where the student has previously been deemed eligible for special education and an IEP proposed or implemented. See Sandler v. Hickey, 246 F.3d 667, 2001 WL 227307 (4th Cir. 2001) (Maryland equivalent of federal prior notice requirement did not apply where no IEP had been proposed before parents enrolled child in the Grove School). Moreover, the plain language of this regulation clearly does not require a denial of reimbursement if parents fail to provide proper prior notice of their objections to the IEP and intentions to place their child in a private school at public expense; it states only that the cost of reimbursement "may be reduced or denied" as the result of the parents' lack of communication. Nevertheless, at least one hearing officer has ruled that similar notice provisions under Maryland law are mandatory where an IEP is in dispute, and concluded that "the Parents' failure to comply with those requirements cripples any claim to reimbursement, regardless of whether the proposed placement provided FAPE or not." Prince George's County Pub. Sch., 28 IDELR 680 (SEA MD 1998).

Indeed, even when denying reimbursement on this basis is viewed as discretionary, most courts and hearing officers have ruled in favor of schools, dismissing or reducing reimbursement claims where parents fail to give timely notice of their intentions. See, e.g., Pollowitz v. Weast, 34 IDELR 171 (4th Cir. 2001) (upholding dismissal of tuition reimbursement claims where parents' letter to school officials merely informed the district of the student's private placement without indicating that the proposed IEP was unsuitable); M.C. v. Voluntown Bd. of Educ., 226 F.3d 60 (2nd Cir. 2000) (holding that child was barred from reimbursement for the costs of his psychological treatment, where child's parents failed to raise any issue with respect to the psychological services provided in the IEPs until after the treatment had ended); James v. Upper Arlington City Sch. Dist., 228 F.3d 764 (6th Cir. 2000) (holding that parents could not recover private school tuition expenses retroactively between the initial removal of child from district and date they subsequently sought IEP, although they could pursue reimbursement claim for tuition costs after date that IEP was sought); Lower Merion Sch. Dist., 33 IDELR 139 (SEA PA 2000) (denying reimbursement because parents engaged in "unfair gamesmanship," removing the child from school without notice several months after agreeing to an IEP that "provided every detail they demanded," and then "delaying the scheduled hearing for the remainder of the school year without any overriding justification."); Upper Darby Sch. Dist., 33 IDELR 22 (SEA PA 2000) (rejecting reimbursement claim because parents failed to provide timely written notice, including their specific concerns, ten business days before enrolling their child in a private school); Nein v. Greater Clark County Sch. Corp., 95 F.Supp.2d 961 (S.D. Ind. 2000) (reducing by one half the reimbursement originally ordered where parents failed to comply with prior notice requirements)

2. Procedural Defense #2: Parents' Failure to Object to IEP Prior to Unilateral Placement

In addition, a number of courts, while not relying on the 10-day notice requirements in IDEA '97, have nonetheless dismissed reimbursement claims because of the parents' failure to object to the IEP and provide school officials with an opportunity to remedy concerns prior to unilaterally placing a child in a private setting. The general principle here is that "[s]chool boards must be given adequate notice of problems if they are to remedy them, and must be given sufficient time to respond to those problems before they can be held liable for failure to act." Combs v. School Bd. of Rockingham County, 15 F.3d 357, 363-64 (4th Cir. 1994). See also Alexander K. v. Virginia Bd. of Educ., 30 IDELR 967 (E.D. Va. 1999) (denying reimbursement where parents chose to withdraw the student rather than expressing their disagreement in a renewed IEP or requesting an administrative review or hearing at the time); In Re Student With a Disability, 30 IDELR 97 (SEA DEL 1999) (dismissing reimbursement claims because parent provided no notice of disagreement with student's 8th grade educational placement or his proposed high school placement prior to withdrawing student and enrolling him in private school); Board of Educ.of Avon Lake City Sch. Dist., 9 F.Supp.2d 811 (N.D. Ohio 1998) (denying $71,000 reimbursement claim for tuition at Elan School in Maine because parents "failed or neglected to take appropriate action to express their dissatisfaction with the District's programs or to inform the District that they were withdrawing [student] from school."); Wise v. Ohio Dep't of Educ., 80 F.3d 177 (6th Cir. 1996) (holding that parents were not entitled to reimbursement because they unilaterally changed their child's educational placement without ever making a formal complaint to the district or asking the district to place their child in a residential care facility); Mary P. v. Illinois State Bd. of Educ., 934 F.Supp. 989 (N.D. Ill. 1996) (denying parents reimbursement between April 1991, when they were denied services, and January 1992, when they first registered dissatisfaction with the district); Round Rock Indep. Sch. Dist., 25 IDELR 336 (SEA TX 1996) (holding that parents waived right to reimbursement between the spring of 1994, when they signed student out, without notice to the district that they wanted a different program, and January 1995, when they informed the district they wanted reimbursement for residential treatment program); Evans v. District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988) (holding that parent was not entitled to reimbursement where she expressed concerns about child's public school placement but never formally or informally asked district to make a change of placement; "school officials were never given the opportunity to make (or refuse to make) changes because the parents unilaterally removed their child from the school district."); Lake Washington Sch. Dist. No. 414, 257 IDELR 611 (OCR 1985) (finding that district was not required to fund an out-of-district placement that the parents selected unilaterally, without consultation with the district).

3. Procedural Defense #3: Parents' Delay in Requesting Due Process

A third procedural defense school officials may need to consider is laches, that is, the prejudicial effect of the parents' delay in pursuing due process against the district. A distinct body of case law has begun to emerge holding that parents are not entitled to an IDEA remedy when

they wait long periods of time before seeking tuition reimbursement in due process proceedings; courts reaching this conclusion have relied on the following reasoning:

> [M]ere notice of parental "dissatisfaction" does not alone put the Board on reasonable notice that the parents will challenge a particular IEP in the future and seek reimbursement for an interim unilateral placement in a private institution. Absent initiation of review proceedings within a reasonable time of a unilateral decision to transfer a child to a private institution, a school district would not know to continue to review and revise an IEP, and the court would be left to hazard conjecture or hypothesis as to what the Board of Education might have proposed if it had been informed of the parents' continued intent to pursue an appropriate education for their child within the school district. We, of course, recognize that the school district has the duty in the first instance to provide an appropriate IEP, and moreover, to demonstrate by a preponderance at a due process hearing that the IEP it offered was indeed appropriate. With that foremost in mind, we must nevertheless also recognize that as a practical reality, and as a matter of procedural law, . . ., the right of review contains a corresponding parental duty to unequivocally place in issue the appropriateness of an IEP. This is accomplished through the initiation of review proceedings within a reasonable time of the unilateral placement for which reimbursement is sought. We think more than two years, indeed, more than one year, without mitigating excuse, is an unreasonable delay.

Bernardsville Board of Educ. v. J.H., 42 F.3d 149, 158 (3rd Cir. 1994). See also White v. School Bd. of Henrico County, 549 S.E.2d 16 (Va. Ct. App. 2001) (holding that where parent signed and consented to IEP, her objection to its implementation one year later was untimely, and warranted denial of reimbursement); L.K. v. Board of Educ. for Transylvania County, 113 F.Supp.2d 856 (W.D.N.C. 2000) (denying reimbursement where parent did not initiate due process hearing until more than two years after unilaterally placing child in private school); Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80 (3rd Cir. 1999) (holding that parents could not recover "tuition reimbursement for the period preceding the parents' request for a due process hearing."); Board of Educ. of the City Sch. Dist. of the City of New York, 29 IDELR 143 (SEA NY 1998) (denying tuition reimbursement for the 1996-97 school year where parent waited over 15 months between unilateral placement and her request for due process); Phillips v. Board of Educ. of Hendrick Hudson Sch. Dist., 25 IDELR 500 (S.D.N.Y. 1997) (holding that the equitable doctrine of laches barred parents from reimbursement for the first three years of child's private placement where parents did not file a due process complaint until five years after the private placement); Garland Indep. Sch. Dist. v. Wilks, 657 F.Supp. 1163 (N.D. Tex. 1987) (holding that parent was not entitled to reimbursement for expenses of residential placement incurred prior to her challenge of child's IEP).

4. Substantive Defenses: Proving the Appropriateness of the IEP

Of course, whether or not school officials can rely on procedural defenses, they will almost certainly have to prove the appropriateness of the IEP in order to prevail in a tuition reimbursement case. Two points bear emphasizing here.

First, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996). In other words, "[a]n IEP is a snapshot, not a retrospective." Roland M. v. Concord Sch. Committee, 910 F.2d 983, 992 (1st Cir. 1990), cert. denied, 499 U.S. 912 (1991). Therefore, a student's IEP must be evaluated in the context of the student's needs, as well as the district's knowledge of those needs, at the time the IEP was developed.

Second, the "some benefit" standard articulated by the Supreme Court in Rowley[21] has been interpreted by the lower federal courts to mean that the IEP must confer more than a trivial educational benefit. Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985). Courts have consistently held that an IEP does not meet the substantive requirement of FAPE unless it confers a "*meaningful* educational benefit." M.A. v. Voorhees Township Bd. of Educ., 202 F.Supp.2d 345, 361 (D.N.J. 2002) (citing Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 181 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989)).

It is also important to note that IEPs do not have to articulate every minute detail of a child's program in order to be legally sufficient. The Tenth Circuit has observed that "there is no legal authority requiring a particular level of specificity in the statement of annual goals," and that "IEPs are not required to provide the level of detail found in monthly instructional plans." O'Toole v. Olathe Unified Sch. Dist. No. 233, 144 F.3d 692, 706 (10th Cir. 1998). In fact, the Fifth Circuit has ruled that an IEP meets the Rowley FAPE mandate as long as it meets a four-pronged test: "(1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders;' and (4) positive academic and non-academic benefits are demonstrated." Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 347-48 (5th Cir. 2000) (quoting Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997), cert. denied, 522 U.S. 1047 (1998)).

D. Is the Private Placement "Proper Under the Act?"

Under Burlington/Carter, parents seeking tuition reimbursement must do more than show that the District denied FAPE to their child. They must also show that the private placement they unilaterally selected was "proper under the Act." This second prong of the analysis becomes critical in cases involving students with drug and delinquency problems because the evidence often demonstrates that a residential program was pursued for reasons completely unconnected to education.

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[21] Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 203-204 (1982).

1. Emotional Disturbance v. Conduct Disorder: A Split in the Circuits

Closely intertwined with the "child find" issue is the issue of whether a student has a disability that warrants residential placement. In many of the cases involving drug addicted students, parents allege that their children meet the criteria for "serious emotional disturbance," which are set forth in the IDEA's regulations, as follows:

> (i) The term [emotional disturbance] means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
> (C) Inappropriate types of behavior or feelings under normal circumstances.
> (D) A general pervasive mood of unhappiness or depression.
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems
> (ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.[22]

Unfortunately, neither the IDEA nor its regulations provide an operational definition for the terms "adverse effect" or "social maladjustment." Therefore, it is not uncommon, particularly with children exhibiting "bad behavior," to have disagreement among parents and professionals, with the result often being litigation. As one author has noted: "If the disagreement can not be worked out through the IEP Team process, then courts are the final arbiters of whether the child receives special education and related services in the school setting. The clashes often arise when these two different sets of professionals [educators and mental health professionals], who use completely different sets of vocabularies, attempt to mesh their frameworks together to understand the child and his or her needs."[23]

Yet even the courts cannot agree on what these terms mean, and a significant split has developed among the circuits that is begging for resolution by the Supreme Court. On the one hand, the Fourth Circuit has adopted a narrow definition of ED, concluding that where students persist in unruly behavior outside societal norms, such as substance abuse and delinquency, they are most appropriately labeled "socially maladjusted" rather than ED. In Springer v. Fairfax County Sch. Bd., 134 F.3d 659, 664 (4th Cir. 1998), the court reasoned: "[A] 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional

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[22] 34 C.F.R. § 300.7(c)(4) (emphasis added).

disturbance would exponentially enlarge the burden IDEA places on state and local education authorities."

Indeed, the weight of both court and administrative authority lines up with Springer, particularly where the student's difficulties occur primarily, or solely, outside of school. See, e.g., Katherine S. v. Umbach, No. CIV A. 00-T-982-E, 2002 WL 226697 (M.D. Ala. Feb. 1, 2002) (student in conflict with parents not ED); DeSoto County Sch. Dist., 102 LRP 3846 (SEA MISS.) (drug abusing student not ED); West Chester Area Sch. Dist., 32 IDELR 275 (SEA PA 2000) (drug abusing student not ED); Bonita Unified Sch. Dist., 32 IDELR 273 (student with severe behavior problems at home not ED); Capistrano Unified Sch. Dist., 31 IDELR 199 (marijuana-using student with diagnosis of depression not eligible for special education under OHI category); Hoffman v. East Troy Community Sch. Dist., 38 F.Supp.2d 750, 767 (E.D. Wis. 1999) (finding that student who was sleeping in class, fighting with his parents, and seeing a therapist for depression was not ED, and noting that the basic standard for ED is "commonsensical: an ED child's behavioral problems must be unusually serious as compared to the majority of his peers and must present a significant impediment to learning."); Davis County Sch. Dist., 102 LRP 4246 (SEA UT 1998) (student who was defiant with parents and abusing drugs and alcohol not ED); Williams Unified Sch. Dist., 26 IDELR 1198 (SEA CA 1997) (drug abusing student not ED); In Re T.L., 26 IDELR 1374 (SEA ILL. 1997)(drug and alcohol abusing student not ED); Mt. Diablo Unified Sch. Dist., 26 IDELR 338 (SEA CA 1997) (holding that student was not ED where student's school difficulties were caused by other factors, including substance abuse, lack of effort, and failure to attend class); Radnor Township Sch. Dist., 25 IDELR 1229 (SEA PA 1997) (student with long history of serious drug abuse, manipulative behaviors, theft, lying, and defiance with parents not ED); Board of Educ. of Midland Pub. Sch., 25 IDELR 669 (SEA MI 1996) (student who engaged in serious alcohol and drug use, got himself tattooed, pierced his ears and nose, mistreated his dog, threatened his sisters, extorted lunch money from younger students, engaged in group sex, and broke windows not ED); Pflugerville Indep. Sch. Dist., 21 IDELR 308 (SEA TX 1994) (student whose behavioral problems were attributable to his family life and drug abuse not ED); Fauquier County Pub. Sch., 20 IDELR 579 (SEA VA 1993) (student who exhibited behavioral problems outside of school not ED because her condition did not adversely affect her educational performance); Blickle v. St. Charles Community Unit Sch. Dist. No. 303, 20 IDELR 167 (N.D. Ill. 1993) ("A school cannot be held responsible for all psychiatric or other medical problems (including substance abuse), particularly when these problems manifest themselves beyond the parameters of a regular school day and do not directly bear on a child's instructional needs."); A.E. v. Indep. Sch. Dist. No. 25, 936 F.2d 472 (10th Cir. 1991) (holding that student

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[23] Ellen A. Callegary, The IDEA's Promise Unfulfilled: A Second Look at Special Education & Related Services for Children with Mental Health Needs After Garrett F., 5 **J. Health Care L. & Pol'y** 164, 184 (2002).

engaging in theft, fighting, tardiness, smoking, use of improper language, and suicidal gestures was not ED, but rather socially maladjusted).

On the other hand, courts in the Fifth, Eighth, and Ninth Circuits have adopted broader definitions of "emotional disturbance," effectively blurring the lines between a student's behavior inside and outside of school. For example, in Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769 (8th Cir. 2001), the Eighth Circuit noted that it believed it "unlikely that Congress meant for the IDEA to require states to provide a home away from home for students who simply make bad choices, even if those choices cause them to fail in school." Id. at 775. At the same time, the court reasoned that simply because most of the student's behavior problems, including drug abuse, sexual promiscuity, running away from home, and check forging, occurred outside of school, that did not mean residential placement was unnecessary. The court explained: "If the problem prevents a disabled child from receiving educational benefit, then it should not matter that the problem is not cognitive in nature or that it causes the child even more trouble outside the classroom than within it. What should control our decision is not whether the problem itself is 'educational' or 'non-educational," but whether it needs to be addressed in order for the child to learn." Id. at 777. See also Venus Indep. Sch. Dist. v. Daniel S., No. CIV. A. 301CV1746P, 2002 WL 550455 (N.D. Tex. 2002) (holding that student was OHI and ED because, even though student's academic performance was well above average, his behavioral problems, which resulted in over 20 suspensions, had an adverse effect on his overall educational performance; "a true measure of a child's educational performance is not strictly limited to an evaluation of his performance in academics."); County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458, 1467 (9th Cir. 1996) (in determining whether a child's impairment has an adverse effect on educational performance, courts must consider that "educational benefit under the IDEA . . . is not limited to academic needs but includes social and emotional needs that affect academic progress, school behavior, and socialization."); Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996) (explaining that the term "unique educational needs" shall be broadly construed to include the disabled child's academic, social, health, emotional, communicative, physical and vocational needs).

2. Private Placements for Reasons Separate and Apart from the Learning Process

Closely connected with the issue of eligibility is the issue of motive for the private placement. In the Fourth Circuit, the burden rests on the parents to show that the private placement they select is a proper placement "for their [child's] special educational needs." Tice v. Botetourt County Sch. Bd., 908 F.2d 1200, 1208 n.11 (4th Cir. 1990) (emphasis added). Further, the Fourth Circuit's position is that residential care is mandated only if it is "essential for the child to make *any* educational progress at all." Burke County Board of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990). "If residential placement is necessitated by medical, social, or emotional problems that are segregable from learning process, then the local education agency need not

fund the residential placement." Id. See also, Tennessee Dep't of Mental Health and Mental Retardation v. Paul B., 88 F.3d 1466, 1471 (6th Cir. 1996) (same).

Thus, numerous courts and hearing officers have denied reimbursement where the placement was made for reasons unrelated to education. For example, parents are not entitled to reimbursement where the child is placed in a residential setting for medical or psychiatric treatment. See, e.g., University of Iowa Hosp. & Clinics, 34 IDELR 169 (SEA IA 2001); Tredyffrin/Easttown Sch. Dist., 33 IDELR 254 (SEA PA 2000); Butler v. Evans, 225 F.3d 887 (7th Cir. 2000); Daugherty v. Hamilton County Sch., 21 F.Supp.2d 765 (E.D. Tenn. 1998); San Juan Unified Sch. Dist., 28 IDELR 47 (SEA CA 1997); Gladstone Sch. Dist. v. A.M., 25 IDELR 131 (9th Cir. 1996); Round Rock Indep. Sch. Dist., 25 IDELR 336 (SEA TX 1996); Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990); McKenzie v. Jefferson, 566 F.Supp. 404 (D.D.C. 1983).

Likewise, parents have not been successful with reimbursement demands where they unilaterally placed their children in residential programs for treatment necessitated by family conflict, drug abuse, or delinquent behavior. See, e.g., Indian River County Sch. Bd., 36 IDELR 47 (SEA FLA. 2002) (student engaged in drug abuse and sexual promiscuity); Dale M. v. Board of Educ. of Bradley Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813 (7th Cir. 2001) (student involved with drug abuse and juvenile delinquency); West Linn-Wilsonville Sch. Dist., 102 LRP 2443 (SEA OR. 2000) (student drug abuser who engaged in uncontrollable anger and destruction of objects at home); Armstrong v. Alicante Sch., 44 F.Supp.2d 1087 (E.D. Cal. 1999) (holding that drug prevention or intervention are not supportive services required by IDEA); Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ., 21 F.Supp.2d 862 (N.D. Ill. 1998) (student placed in psychiatric facility for "out-of-control" behavior, including running away, drug abuse, and defiance of home rules); Board of Educ. of Montgomery County v. Brett Y., 155 F.3d 557, 1998 WL 390553 (4th Cir. 1998) (student placed in a private program, the Grove School, for significant behavior problems at home); Pleasant Valley Community Sch. Dist., 28 IDELR 1295 (SEA IA 1998) (students' private psychotherapy prompted by home issues, including threats against her parents); Field v. Haddonfield Board of Educ., 769 F.Supp. 1313 (parents were responsible for the cost of student's enrollment in private drug treatment program); Brian M. v. Boston Pub. Sch., 401 IDELR 341 (SEA MA 1989) (ED student who abused drugs and alcohol).

E. Equitable Considerations

Finally, school officials should remember arguments of basic fairness in reimbursement cases. See Burlington, 471 U.S. at 374 ("equitable considerations are relevant in fashioning relief."). The IDEA regulations stipulate that reimbursement may be denied upon "a judicial

finding of unreasonableness with respect to actions taken by the parents,"[24] and hearing officers and courts "look harshly upon any party's failure to reasonably cooperate with another's diligent execution of their rights and obligations under the IDEA." Particia P. v. Board of Educ. of Oak Park, 203 F.3d 462, 469 (7th Cir. 2000). See also W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992) ("The conduct of both parties must be reviewed to determine whether relief is appropriate.").

Thus, schools can defeat reimbursement claims if parents have, among other things, negotiated in bad faith, concealed information, or refused to make their child available to school officials for evaluation. See, e.g., Montgomery County Pub. Sch., 31 IDELR 223 (SEA MD 2000) (parents continually delayed proposed meeting times and refused to submit information; parents "appeared more interested in the district as a funding source rather than as an educational source."); Glendale Unified Sch. Dist. v. Almasi, 122 F.Supp.2d 1093 (C.D. Cal. 2000) (reducing reimbursement award where parent withheld information from school officials which impaired their ability to make decisions about the child's program); L.K. v. Board of Educ. for Transylvania County, 113 F.Supp.2d 856 (W.D.N.C. 2000) (denying reimbursement where parent unilaterally withdrew child without providing district opportunity to evaluate his needs); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998) (denying reimbursement where parents enrolled child in private school without conferring with school officials or providing them with opportunity to evaluate and formulate a plan); Montgomery County Pub. Sch., 24 IDELR 400 (SEA MD 1996) (parents denied reimbursement for refusal to cooperate with the district in evaluating the child); New York City Bd. of Educ., EHLR 508:119 (SEA NY 1986) (parents failed to cooperate in good faith with the district by refusing to make information available and refusing to attend IEP meeting).

IV. Recommendations

Ideally, with the next reauthorization of IDEA, Congress will rewrite some of the provisions on unilateral placements to make some of these issues less controversial. For example, Congress should provide a more narrow definition of ED, with an accompanying definition of "social maladjustment." In addition, given school districts' tight budgets and the failure of Congress to provide full funding of the IDEA, Congress should revise the parental notice provisions so that a failure to comply would result in an automatic denial of reimbursement.

In the meantime, school officials can still reduce their potential exposure for tuition reimbursement claims by taking a number of steps, including:

1. Ensure that all parents and staff are aware of the 10-day prior notice requirement. Notwithstanding the notice requirement, parents can still recover if they did not receive notice of the notice requirement. 34 C.F.R. § 300.403(e)(4).

[24] 34 C.F.R. § 300.403(d)(3).

2. Upon learning that parents are withdrawing their child and pursuing a private residential program, insist on full disclosure of all information and request parents' consent for further evaluation, particularly if there is any concern at all that behavioral/emotional/medical problems outside of school have adversely affected the child's behavior or academic performance at school. Schools have the right, under the IDEA, to evaluate students with their own personnel, even in the face of allegations that further evaluations might result in medical or psychological harm to the student. Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176 (5th Cir. 1995).

3. Bend over backward to demonstrate good faith and a willingness to work with the parents toward a return of the student to public school. This approach should include, for students who still have more than one year of school left after withdrawal, inviting the parents to an IEP meeting to develop a new IEP for the ensuing school year, although it is not clear whether school officials are legally obligated to do so.[25] Compare Carl D. v. Special Sch. Dist. of St. Louis County, 21 F.Supp.2d 1042 (E.D. Mo. 1998); and Amann v. Stow Sch. Sys., 982 F.2d 644 (1st Cir. 1992); and Questions and Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by Their Parents at Private Schools, OSEP Memorandum 00-14 (OSEP May 4, 2000) (all holding that the IDEA does not impose a continuing duty upon school districts to develop and implement IEPs for students unilaterally placed in private school by their parents) with Redding Elementary Sch. Dist. v. Goyne, 34 IDELR 118 (E.D. Cal. 2001); and Justin G. v. Board of Educ. of Montgomery County, 148 F.Supp.2d 576 (D. Md. 2001); and Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001); Upland Unified Sch. Dist., 102 LRP 7623 (SEA CA 2000); and Doolittle v. Meridian Joint Sch. Dist. No. 2, 24 IDELR 357 (Idaho 1996) (all holding that school officials have an ongoing duty to annually update a student's IEP and to provide FAPE once they are on notice that a student has been unilaterally placed by his parents in a private school).

4. Carefully scrutinize the program and services delivered to the child in the private placement. Many of the residential treatment programs in which drug abusing students enroll are nothing more than behavior modification programs, which are inappropriate under the Act for a number of reasons, including the fact that they may not deliver any educational services, much less an individualized program,

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[25] The regulations state only that each public agency must ensure that "an IEP is developed and implemented for each eligible child placed in or referred to a private school or facility by the public agency." 34 C.F.R. § 300.341(a)(2) (emphasis added).

and may, because of their restrictive nature, violate the IDEA"s least restrictive environment (LRE) mandate.

5. Remember that drug addiction itself is not a disabling condition under the IDEA, and therefore, if psychiatric treatment is required solely to treat the child's addiction, and is not required to provide FAPE, the school is not required to provide the treatment or to provide it at no cost. Letter to Woodson, 213 IDELR 224 (OSEP 1989). Significantly, the IDEA "is not a panacea for all of life's ills,"[26] and school officials cannot be held responsible under the Act for failing to remedy "adolescence."[27]

[26] Maricus W. v. Lanett City Bd. of Educ., 141 F.Supp.2d 1064, 1069 (M.D. Ala. 2001).

[27] Socorro Indep. Sch. Dist. v. Angelic Y, 107 F.Supp.2d 761, 767 n.8 (W.D. Tex. 2000).

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